INDEX

	Page
Opinion below, Jurisdiction, and Statutes involved	1
Question presented	1
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Alabama-Tennessee Natural Gas Co. v. *Federal Power Commission*, 359 F. 2d 318, certiorari denied, 385 U.S. 847	4
California v. *Federal Power Commission*, 345 F. 2d 917, certiorari denied, 382 U.S. 941	8
El Paso Natural Gas Co., 30 FPC 77	2
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1	8, 10
Market Street Railway Co. v. *Railroad Commission of California*, 324 U.S. 548	8
Permian Basin Area Rate Case (*Skelly Oil Co.*), 34 FPC 159, affirmed in part and reversed in part, 375 F. 2d 6, affirmed, May 1, 1968, Sup. Ct. Nos. 90, 117, *et al.*, O.T. 1967	4
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	8
Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F. 2d 608, certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941	6
United States v. *Pierce Auto Lines*, 327 U.S. 515	8

Statutes:

Natural Gas Act, June 21, 1938, c. 556, section 7(c), 52 Stat. 824, as amended, 15 U.S.C. 717f(c) ..... Page 10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW, JURISDICTION AND STATUTES INVOLVED

The opinion of the court of appeals (Pet. 2a–3a) is now reported at 387 F. 2d 619. Otherwise, the opinions below, this Court's jurisdiction, and statutes involved are adequately described in the petition, pp. 1–2, 5a–14a.

QUESTION PRESENTED

Whether the Commission's certification of two consistent proposals—and not a third inconsistent one—for the sale and transportation of natural gas to southern California was rationally based, supported in the record, and reached through proper procedures.

STATEMENT

The Commission initiated a comparative proceeding to consider competing applications for certificates of public convenience and necessity for pipeline facilities to transport additional supplies of natural gas to southern California. *El Paso Natural Gas Co.*, 30 FPC 77, 92–93. Transwestern Pipeline Company and El Paso Natural Gas Company made separate proposals to expand their existing facilities to increase deliveries, in stages, from 300,000 Mcf to 640,000 Mcf per day for Transwestern and from 1,130,000 Mcf to 1,380,000 Mcf per day for El Paso, plus additional overrun ("LX") sales (J.A. 744–747).[1] The cost of Transwestern's proposed facilities was estimated at about $44 million (J.A. 746) and El Paso's at about $50 million (J.A. 745).

Major portions of the additional gas were to be sold to Pacific Lighting, a group of companies which are the principal distributors of gas in southern California[2] and which resell natural gas to, *inter alia*, petitioner and the Los Angeles Department of Water and Power ("Los Angeles Department") on an interruptible basis for boiler fuel (J.A. 614, 743). El Paso has customers in addition to Pacific Lighting in California and both El Paso and Transwestern have other customers in other States; both agreed, if they were granted certificates, to reduce their rates to all cus-

[1] "J.A." refers to the Joint Appendix in the court of appeals.

[2] The Pacific Lighting group consists of Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Gas Supply Company (now Pacific Lighting Service and Supply Company), all subsidiaries of Pacific Lighting Corporation (J.A. 742).

tomers. The Commission found that the reductions would amount, in 20 years, to $165 million in the case of El Paso and $426 million in the case of Transwestern (J.A. 785, 786).

A competing application was filed by the now-dissolved Gulf Pacific Pipeline Company. It sought to build a new pipe line from Texas to southern California to transmit purchases which petitioner and the Los Angeles Department would make in Texas from Humble Oil & Refining Company and other producers. The estimated cost of the line exceeded $300 million. It would bring the two purchasers—but no one else—large quantities of natural gas, reaching, after five years of operation, 865,095 Mcf daily. (J.A. 747.)

After extensive proceedings, the Commission found that the combination of the El Paso and Transwestern proposals (referred to as the Tailored Supply Program or "TSP") would maintain the existing level of service and would better serve the public convenience and necessity (J.A. 795) than the Gulf Pacific proposal. The Commission found: 1) at the level of service it deemed preferable, the incremental cost of El Paso-Transwestern gas at the Los Angeles load centers would be lower than the cost of Gulf Pacific gas[3] (J.A. 783–789); 2) the El Paso-Trans-

[3] In these cost comparisons, the Commission made several assumptions favorable to Gulf Pacific: (1) although its contract called for a price of 18.5 cents per Mcf, the Commission assumed an in-line price of 17 cents (J.A. 777–778, 782); (2) the Commission based its comparison with the cost of the El Paso and Transwestern proposals on rates of return higher for each company than those then in effect or those the Commission finally allowed (J.A. 784, 806–807); (3) the Commission did not include in its cost figures possible further reductions in El-

western proposals would result in multi-million dollar annual savings to all customers including Pacific Lighting[4] (J.A. 787–788); and 3) there would be further savings to Pacific Lighting and petitioner in the purchase of California-produced gas, the price of which is mostly tied to the border price of out-of-state gas (J.A. 786). On the other hand, the Commission found that certification of all three proposals would result in an excess of supply and that, although the Gulf-Pacific proposal would provide greater volumes of gas to petitioner and the Los Angeles Department, it would tie them to large purchases for twenty years, thus impairing their flexibility to adjust to foreseeable developments in anti-pollution devices (J.A. 758–759, 796) and to alternative and possibly cheaper sources of energy, such as nuclear-powered plants, remotely located coal-fired steam electric plants, and extra-high-voltage interregional interties (J.A. 796–797).

The Commission denied Gulf Pacific's application and granted certificates to El Paso and Transwestern conditioned on their reducing their rates further than

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Paso's and Transwestern's rates resulting from the producer rate reductions ordered in the *Permian Basin Area Rate Case*, 34 FPC 159, affirmed and reversed in part, *sub nom. Skelly Oil Co.*, 375 F. 2d 6 (C.A. 10), Commission affirmed, May 1, 1968, Nos. 90, 117, et al. O.T. 1967; and (4) the Commission also did not include the possibility of reduced tax costs on the basis of liberalized-depreciation savings, which the Commission has since required these companies to flow through to their customers. See *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318 (C.A. 5), certiorari denied, 385 U.S. 847.

[4] Reductions have been put into effect saving Pacific Lighting $12 million annually. As a result its rates have been reduced, saving petitioner almost $3 million annually.

proposed, and required other, future rate reductions to pass on expected cost savings (J.A. 805–808). The certificates, so conditioned, were accepted by El Paso and Transwestern (J.A. 880, 882).

Gulf Pacific Pipeline Company was dissolved. The producers terminated their contracts for the sales of gas here involved to petitioner and the Los Angeles District; the gas has been sold to other purchasers (J.A. 998–1039).

Applications for rehearing were filed (J.A. 884–989) and denied (J.A. 1057–1071). Petitioner, but no other party, sought review in the Court of Appeals for the Third Circuit. That court, in a *per curiam* opinion (Pet. 2a–3a) affirmed the Commission's order.

ARGUMENT

The Commission proceeded in the manner required by law and based its decision on ample evidence of record. The petition, moreover, presents no question of general importance to the administration of the Natural Gas Act. The Gulf Pacific proposal is dead, and the issues relating to it are academic.

1. Petitioner did not raise in the court of appeals its present contentions (Pet. 20–24) that the Commission failed to give proper weight to the relative effect of the competing proposals on air pollution. But even if those arguments are properly here, they have no merit. Surely the Commission is not bound, as petitioner argues, by the judgment of the local au-

thorities.[5] The ultimate determination as to the overall public interest on the question of pollution rests with the Commission just as it does with respect to any other matter within the Commission's jurisdiction. Cf. *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (C.A. 2), certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941.

Air pollution received a great deal of attention at the hearings[6] and in the Commission's decision (J.A. 750–759; see, also, J.A. 1060–1062). The Commission found (J.A. 758) "the record does not establish that certificating one rather than another of the proposals now before us will have any appreciable effect upon human health." The evidence the Commission cited amply supports this conclusion.

2. The Commission did not (see Pet. 12–20) improperly rely on, and deny petitioner an opportunity to cross-examine and rebut, material outside the record. The Gas Balance to which petitioner objects (Pet. 15–20) compares the costs of the gas that would be in the market with the addition of the amounts Gulf Pacific proposed to bring petitioner and the Los Angeles Department to the cost of all the gas that would be in the market upon certification of the TSP

[5] Significantly, none of these local authorities petitioned for review or sought intervention in the court of appeals, although some had appeared before the Commission.

[6] More than a month of hearings and thousands of pages of evidence were devoted to the subject. The Commission's holding with respect to air pollution was not challenged in the court below, so that relevant record material was not brought before that court.

proposals,[7] at the level of service the Commission found consistent with the public interest.[8] The computation is complex because of the limitations on available data,[9] and the variations in the rates for the gas coming into the market (see J.A. 815). The underlying

[7] The comparison showed that the "rolled-in," or fully distributed, costs of all gas delivered to Los Angeles would be one-fiftieth of a cent per Mcf less with the Gulf Pacific proposal than with the El Paso-Transwestern proposal. But this slight difference, as the Commission noted, would be outweighed by reductions in the proposed El Paso and Transwestern rates of return and other anticipated cost reductions, as well as by effected reductions in rates charged customers outside of California (J.A. 788).

[8] Petitioner's proferred revision of the Gas Balance (Pet. 19a–31a), which purports to "correct" the Commission's, is based on a higher level of gas service that includes the Gulf Pacific volumes *plus* additional volumes from El Paso and Transwestern.

Had the Commission taken this approach, the reduction in Transwestern's rates would have been deferred several years because Transwestern would not have begun to supply increased volumes until November 1, 1970, and El Paso's proferred rate reduction would be without cost justification, since the offer contemplated a 100 percent load factor, while petitioner's revision calls for an annual load factor of only 95.9 percent (Pet. 20a). Nevertheless, petitioner's calculation assumes that the rate reductions would have been immediately effected even if the Gulf Pacific proposal were accepted.

[9] The El Paso-Transwestern proposal covered the period through 1968, and the supply figures in the record did not go beyond that year. The Commission therefore used the figures for that year for El Paso and Transwestern, and to avoid the developmental years, figures estimated for the third year of operation of Gulf Pacific. This is why the Gas Balance showed, as petitioner notes (Pet. 19), a zero gas storage balance in the winter of 1970. But increased supplies after 1968 were not ruled out; indeed, with growing demand, maintenance of the level of service would require such increases (J.A. 760–765). Proceedings looking to additional supplies are indeed now in progress. See pp. 10–11, *infra*.

data are, however, all in the record,[10] in accordance with the rule of *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 560. The matters of which petitioner complains are only the conclusions the Commission inferred from these facts of record. Such a prognosis is plainly committed to the Commission's expert judgment; the right of cross examination attaches only to the underlying evidence. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800; cf. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 529–530; *California* v. *Federal Power Commission*, 345 F. 2d 917, 926–927 (C.A. 9), certiorari denied, 382 U.S. 941. That right petitioner had and exercised.[11]

3. It is true, as petitioner says (see Pet. 24–27), that the Commission first set out to determine in this matter how the long-term needs of the southern California market might be met, and then concluded the proceedings by certificating proposals that, by

[10] The Commission's figures for firm requirements (J.A. 1076–1081) are those in Exhibit 316 (J.A. 316–317). These figures were adjusted upward to reflect Gulf Pacific's estimate of annual interruptible steam electric potential (J.A. 241), averaged on a daily basis. See J.A. 813, 686–687.

[11] The Commission's citation of Congressional and other material not in the record were, as the Commission itself explained (J.A. 1063), merely cumulative of large volumes of evidence already in the record, see J.A. 11, 35–43, 70–82, 85–86, 88–89, 91–96, 193–212, 247–296. The Commission's decisions on these points could indeed have stood, without the references complained of, on the basis of the Commission's own expertise. "[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29.

themselves, would supply only short-term needs. The record, however, simply did not provide the necessary evidence to determine how much gas would have to be brought into California in the future (J.A. 760). The evidence did show, on the other hand, that petitioner's proposal to certificate its project plus some part of the El Paso-Transwestern TSP proposal would deprive consumers of millions of dollars of savings (footnote 8, *supra*). It was equally clear that to certificate all three proposals would result in an excess of supply for several years, and that petitioner's proposal, by tying the area's major electric utilities to a twenty-year term for purchasing gas, was less in the public interest than the flexibility the El Paso–Transwestern proposal would afford in allowing the utilities to take advantage of future developments of other sources of energy (see p. 4 *supra*). Thus, the Commission acted reasonably, and with ample support in the record, in concluding that the long-term needs of the California market could be met better by periodic reappraisal of supply needs rather than by approval of the Gulf–Pacific project.[12]

[12] The charge of improper delay (Pet. 27; see, also, Pet. 15a–16a) is wholly unjustified. Although petitioner starts its chronology (Pet. 15a) in December 1961, when the "Pemex" proposal to supply petitioner was filed, that proposal was voluntarily abandoned after more than a year passed. The first Transwestern application was filed January 14, 1963. Gulf Pacific's (R. 53031–53115) was not completed until May 15, 1963. The last relevant application was filed October 11, 1963 (Pet. 16a). Petitioner filed a petition to intervene November 1, 1963 (R. 64821–64834).

A prehearing conference was held before a hearing examiner November 19 and 20, 1963 (J.A. 579–581). Cross-examination then began on June 1, 1964; 170 days of oral hearings were

4. The Commission did not ignore (see Pet. 29–30) the statutory limitation precluding it from regulating direct sales of gas for industrial uses. Section 7(c) of the Natural Gas Act requires the certification of all facilities for the transportation of gas in interstate commerce, whatever its intended use. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. The power to deny a certificate obviously includes the power to prevent the sale. Where, as here, the Commission finds that certification would put upward pressure on prices in the interstate market (J.A. 779–781) and adversely affect the customers of the established supplier (J.A. 799), the denial of the certificate is sufficiently justified.

5. Gulf Pacific is out of existence and the gas supply is gone. Petitioner seems to recognize that the proposal is dead beyond revival; it seeks only vacation of the certificates issued to El Paso and Transwestern, to allow it to try to put together a new proposal to be considered in a new comparative hearing. In the meantime and until final decision thereon it requests that

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completed March 17, 1965. Briefing to the examiner was completed August 2, 1965 (J.A. 149–150, 158). The examiner's decision was issued December 16, 1965 (J.A. 612). After the filing of extensive briefs on exceptions to the examiner's decision the Commission heard oral argument March 28 and 29, 1966. Its decision was issued July 26, 1966 (J.A. 738). Rehearing was requested on August 13, 1966, and granted on September 21, 1966 (J.A. 884–951, 1053–1054). The decision on rehearing issued on December 9, 1966 (J.A. 1057–1081).

Thus there was hardly an unnecessary or unreasonable delay in a vigorously contested comparative proceeding for certification of service to the lucrative southern California market, involving multi-million dollar facilities.

there be no interruption or suspension of the flow of El Paso-Transwestern gas.[13]

Further litigation of this case is wholly unnecessary to achieve such a result. Petitioner is entirely free to make new proposals. Proceedings are now pending on new certificate applications by Pacific Gas Transmission Company (Docket No. CP67–187) and El Paso (Docket Nos. CP67–188, CP67–217) for facilities to increase gas supplies to both northern and southern California.[14] Petitioner should advance any further proposals in those proceedings, where it has intervened in support of the El Paso application.[15]

The only change in result that petitioner seeks here[16] goes to the Commission's refusal (J.A. 1065–1066) to condition its certificates so as to require the withholding of gas supplies from the electric utilities if and when cheaper alternatives should be available. The evidence showed that the price of oil conforms to the price of gas (J.A. 69, 82–83, 143) and petitioner's witnesses testified that they assumed this relationship would continue. The requested condition would, more-

[13] See pp. 3–6 of petitioner's answer of September 22, 1967, to El Paso's motion to dismiss the petition in the court of appeals for mootness, which is on file with the Court.

[14] After the hearings began Transwestern also filed an application (Docket No. CP68–181) for a certificate for facilities to bring additional gas to southern California.

[15] The hearing examiner issued his intermediate decision April 19, 1968. He recommended granting the Pacific Gas Transmission application to bring gas to northern California and deferred decision on El Paso's application pending further hearings proposed by him to determine whether a project using larger facilities would be more in the public interest.

[16] See the third question presented (Pet. 3) and the argument at pp. 30–31 of the petition.

over, have allowed petitioner to circumvent a local air pollution regulation that forbids the use of oil when gas is available. The Commission recognized it did nothing to prevent the use of oil (J.A. 1066). It merely left local authorities free to decide whether future variations in the price of oil should permit power plants to terminate the use of gas, a plainly reasonable exercise of the Commission's discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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